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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 464

CLAYTON MARK & COMPANY, ENAMELED METALS COMPANY, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINION BELOW

The opinion of the Court of Appeals (R. 3678–89) is reported in 168 F. 2d 175.

JURISDICTION

The judgment of the Court of Appeals was entered on August 17, 1948 (R. 3710). The time for filing a petition for writ of certiorari was extended by Mr. Justice Rutledge to December 15, 1948 (R. 3719). Certiorari was applied for on December 15, 1948, and was allowed on January 31, 1949 (R. 3721). The jurisdiction of this Court is

invoked under Section 5 of the Federal Trade Commission Act as amended, 52 Stat. 111, 15 U. S. C. 45, and under Title 28, United States Code, Section 1254.

QUESTIONS PRESENTED

(1) Whether, upon the basis of findings that the petitioners have for many years quoted and sold rigid steel conduit at identical delivered prices determined by the application of a series of artificial pricing formulas (composed of a base price plus specific delivery-charge factors) which each petitioner employed with knowledge that all the other petitioners concurrently employed the same pricing formula, and that the adherence by each petitioner to such system of pricing produced, and was designed to produce, identity in their delivered prices and price quotations, and hindered, lessened and restrained price competition and created a dangerous tendency toward monopolistic control prices, the Federal Trade Commission may validly determine that such practice constitutes an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act.

(2) Whether, if question (1) is answered in the affirmative, the discretion vested in the Commission respecting determination of appropriate relief authorizes it to prohibit each petitioner from quoting or selling at prices determined in accordance with the basing-point, delivered-price system

(or certain variations thereof) for the purpose or with the effect of systematically matching delivered-price quotations with other of the petitioners.

(3) If question (1) is answered in the negative the following question will be presented: Whether, on findings that the petitioners have been engaged in a combination to suppress price competition among themselves by agreeing to employ a basing-point, delivered-price system producing identity in their delivered prices, the Commission may, as a means for effectively dissipating the consequences of such conspiracy, prohibit each petitioner from quoting or selling at prices determined in accordance with the basing-point, delivered-price system (or certain variations thereof) for the purpose or with the effect of systematically matching delivered-price quotations with other of the petitioners.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, as amended by the Act of March 21, 1938, c. 49, 52 Stat. 111, 15 U. S. C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * *
>
> (c) Any person, partnership, or corporation required by an order of the Commis-

> sion to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, * * *. * * * The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. * * *

STATEMENT

In this case the Federal Trade Commission instituted a proceeding under Section 5 of the Federal Trade Commission Act charging the petitioners and others with engaging in unfair methods of competition in interstate commerce. The Commission issued its complaint in January 1941 (R. 21); it filed its findings of fact and conclusion of law and issued its cease and desist order in June 1944 (R. 3481, 3544); and the Court of Appeals for the Seventh Circuit rendered its opinion upholding the validity of the Commission's order in May 1948 (R. 3678).

The Commission's complaint is in two counts. Count I charged the respondents there named with conspiring to suppress competition in the sale and distribution of rigid steel conduit (R. 14–15), a product which will be referred to as

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conduit.[1] The complaint charged that, in furtherance and as a part of this conspiracy, the respondents had agreed to adopt, use and maintain a basing-point, delivered-price formula, with basing points at Pittsburgh and Chicago, and had agreed upon various other specified acts and practices which aided in maintaining or in perfecting the operation of respondents' pricing formula (R. 14–18).

The 20 respondents named in Count II, who will sometimes be referred to as conduit sellers, comprise the domestic producers of conduit and certain companies which sell and distribute conduit manufactured for them by others (R. 4–8, 18–19).[2] Count II was dismissed as to five of these respondents;[3] two of them (Cohoes Rolling

[1] The respondents in Count I are substantially all the domestic producers of conduit (R. 3, 4–7); certain concerns engaged in selling conduit manufactured for them by others (R. 7–8); the Rigid Steel Conduit Association, a trade association of producers of conduit, its officers and directors (R. 3–4); a corporation, its officers, and two other individuals, who had assisted in carrying on activities of said Association (R. 9, 10–11); and a trade association of wholesalers and jobbers of electrical supplies (including conduit) and officers, directors and members thereof (R. 11–13).

[2] These respondents also included General Electric Supply Corporation, a subsidiary of a respondent producer (General Electric Company) and Republic Steel Corporation, which owned all the stock of one respondent producer (Steel and Tubes, Inc.) and 50% of the stock of another respondent producer (Fretz-Moon Tube Company, Inc.). (R. 8, 19.)

[3] Central Tube Company, Garland Manufacturing Company, Lacleede Tube Company, Steel and Tubes, Inc., and General Electric Supply Corporation (R. 3548).

Mill Company and Clifton Conduit Company) did not join in the petitions to review the Commission's order filed in the court below,[4] and one of the petitioners in the court below (Walker Brothers) did not join in the petition for certiorari filed in this Court.

Count II charged that each of the named respondents, with knowledge that the other respondents simultaneously do likewise, have generally refused to sell conduit except at delivered prices determined in accordance with a basing-point formula made up of a base price at one of more specified basing points (irrespective of whether shipment was to be made or was made from such basing point), plus specified freight "adders" or factors with respect to each destination point (R. 19–20). It was further charged that, under the circumstances alleged, this method of pricing necessarily resulted in uniformity, at any given time and destination, in the delivered-price quotations of all the respondents, and that it restrained and suppressed price competition in the sale of conduit and was unfairly discriminatory to purchasers (R. 20–21).

After the taking of evidence before an examiner and a hearing before the Commission on exceptions to the examiner's report, the Commission filed detailed findings of fact (R. 3481–3543). The conclusion which the Commission drew from its findings was that the acts and practices set

[4] R. 3556, 3566, 3579, 3610, 3634.

forth therein constitute unfair methods of competition within the meaning of Section 5 of the Federal Trade Commission Act (R. 3543).

The cease and desist order which the Commission entered is in seven paragraphs (R. 3544–8). The first four paragraphs are directed against the practices charged in Count I of the complaint, and the last two paragraphs of the order are not presently relevant.[5] The fifth paragraph, which will be referred to as Paragraph V, is directed against the practices charged in Count II.

On petitions to review the Commission's order, the court below unanimously held the order valid in its entirety (R. 3678–88) and it entered a judgment of enforcement (R. 3710–6). In the petition for writ of certiorari filed in this Court, the petitioners abandoned all attack upon the Commission's findings of fact and all attack upon its order other than Paragraph V.

THE CONTESTED PARAGRAPH OF THE COMMISSION'S ORDER

Paragraph V of the order (R. 3547–8) directs each respondent named therein to cease and desist, in connection with the sale of conduit in interstate commerce,

> from doing any of the following things for the purpose or with the effect of system-

[5] The sixth paragraph dismisses one or more counts as to certain respondents and the last paragraph requires the respondents to file compliance reports within 60 days after service of the order.

atically matching delivered-price quotations with other of said respondents or producing the equivalent of such matched delivered prices through systematic discriminations in the mill nets received on sales to different purchasers:

(a) Quoting or selling rigid steel conduit at prices calculated or determined pursuant to, or in accordance with, the basing-point, delivered-price system.

(b) Quoting or selling rigid steel conduit at delivered prices calculated as, or systematically equivalent to, the sum of the price in effect at, plus a transportation charge factor from, any point other than the actual shipping point.

(c) Quoting or selling rigid steel conduit at delivered prices which systematically reflect the inclusion of a transportation factor greater or less than the actual cost of transportation from point of shipment to destination.

(d) Discriminating among purchasers by quoting or selling rigid steel conduit at prices which systematically differ in terms of mill nets according to the location of purchasers, and which mill nets, plus common carrier transportation charges to the respective locations of such purchasers, produce delivered costs identical with those to such purchasers from differently located respondents.

THE COMMISSION'S FINDINGS OF FACT

Many of the Commission's findings relate primarily to the conspiracy charged in Count I. Since this branch of the case is only incidentally before the Court, we shall not set forth the findings relating specifically to combination other than to call attention to their general nature as summarized in Finding 19 (a). The Commission there found that the respondents named in Count I (including all present petitioners other than Spang, Chalfant, Inc.), had combined and conspired to suppress price competition in the sale of conduit; to maintain artificial and monopolistic methods and prices in the sale and distribution of conduit; to prepare common rate factors used and useful in determining delivered-price quotations and prices; to classify purchasers of conduit and determine the treatment to be accorded them; to establish and maintain uniform discounts and terms and conditions of sale; to control the use of warehouses on the distribution of conduit; to adopt and use, in aid of price maintenance and control, uniform contracts for distributors and for contractors buying for specific projects; and to support and maintain their price structure by investigating sales and offers to sell and circulating reports thereon (R. 3542–3).

The remainder of this Statement will set forth facts as found by the Commission which we deem

pertinent to the issues raised by petitioners in this Court.

NATURE OF INDUSTRY AND DEVELOPMENT OF FORMULA PRICING METHOD

Rigid steel conduit is steel pipe with a smooth interior surface, galvanized or enameled. It is usually made in sizes of from ¼-inch to 6 inches in interior diameter and is used in buildings and other construction work as a container for, and channel through which, electrical wiring may be drawn. (Fng. 3, R. 3495.)

The manufacture of conduit began some 50 years ago and several of the earliest producers were concerns employed by steel companies as agents for the purpose of converting pipe into conduit and distributing it. The first serially numbered price card of the series presently used was issued in 1913 by two such agents, the respective predecessors of petitioners Garland and National Electric.[6] Similar price cards were issued by the other companies then in business. These cards quoted conduit prices in terms of cents per foot and stated the Pittsburgh basing discounts from such prices. They made provision for reducing the rate of discount and thus increasing the price according to the railroad freight rate from Pittsburgh to the purchaser's destination. At any destination other than Pitts-

[6] In referring to an individual petitioner, we shall ordinarily use only the first name or the first two names of its corporate title.

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burgh the discount was reduced at the rate of one-tenth of a percent for each cent of the railroad rate per hundred pounds from Pittsburgh. This formula did not produce delivered-price differences between Pittsburgh and other points exactly equal to the freight rate. (Fng. 4 (a), R. 3496.)

In 1924, at about the time the steel companies added Chicago, Illinois, as a basing point in the sale of pipe, petitioner Youngstown, which had a conduit plant at Evanston, Illinois, announced an Evanston base price for conduit $4 per ton higher than the Pittsburgh base price, and all other conduit sellers in business at that time announced identical Evanston base prices but maintained the Pittsburgh base. In 1925 petitioner Clayton Mark began the sale of conduit from its Chicago plant and used Chicago as a base instead of Evanston. This did not amount to the establishment of a third basing point because freight rates from Evanston and Chicago are the same to all points except to locations within the Chicago switching district. The formula used for the Pittsburgh base was used for determining delivered prices from Evanston and Chicago. The formula provided that at any given location the delivered price would be based upon Pittsburgh or Evanston, depending upon which base price and accompanying discount produced the lower price at the particular location. (Fng. 4 (b), R. 3496–7.)

The foregoing method of determining and quoting delivered prices continued until June 1930. On June 4, 1930, a plan to simplify the method of quoting delivered prices was discussed at a meeting of petitioners' then existing trade-association organization (see R. 3482). On June 10, 1930, petitioner National Electric issued a booklet containing various tables of "freight adders", by the use of which there would be determined for a large number of destinations the amount, per 1,000 feet of conduit, to be added to the base price as a delivery charge.[7] National Electric also issued a price card (No. 61) prepared for use in connection with these freight adders. Other conduit sellers made a similar change from their previous list-and-discount method of quoting delivered prices. (Fng. 4 (c), R. 3497–8.)

A further change was made late in 1930. Youngstown then issued a delivery charge booklet which, instead of using arbitrary key numbers, set out the delivery charge per thousand feet for each size of conduit, under any railroad tariff rate from one-half cent to $2.24½ per hundred pounds, in one-half-cent steps.[8] At the request of

[7] These "delivery charges" did not represent the exact amounts of the freight charges from the controlling basing point to destination, in part because of the treatment of fractions in the calculations and in part because the charges included a 5% addition to cover the discount allowed purchasers for payment within the cash discount period (Fng. 4 (c), R. 3497).

[8] These delivery charges, like the prior "freight adder" tabulations, included an additional 5%.

nine other conduit sellers, Youngstown sold them copies of its booklet printed without covers. Petitioners and other conduit sellers then distributed these booklets to their salesmen and customers. (Fng. 4 (d), R. 3498.)

Late in 1930 petitioner Clayton Mark abandoned the use of a Chicago base and adopted the Evanston base. All conduit sellers then used only Pittsburgh and Evanston as basing points. This continued until late in 1934. Clayton Mark then reinstituted a Chicago base and dropped the Evanston base, but Youngstown continued the Evanston base. However, when the petitioners and other conduit sellers issued their next price cards (No. 71) in January 1936, the cards were limited to the Pittsburgh and Chicago bases and the Evanston base was eliminated.[9] No further change was made in the pricing formula except to show freight adders in terms of one hundred feet of conduit instead of one thousand feet. (Fngs. 4 (d)–(e), R. 3498–9.)

Chicago has continued to be a basing point although at a later time there was no production there other than the manufacture of large sizes of conduit, but not a full line, at Youngstown's plant at Indiana Harbor, Indiana (Fngs. 4 (e), 16 (a); R. 3499, 3537).

[9] Elimination of this base had been discussed at a directors' meeting of the Rigid Steel Conduit Association held in January 1935 (Fng. 4 (e), R. 3499).

At the time of the Commission's proceeding, conduit was produced at Cohoes, New York; Etna, East Butler, West Pittsburgh, New Kensington, Ambridge, and Conshohocken, Pennsylvania; Alton, Illinois; Moundsville, West Virginia; Struthers, Ohio; and Indiana Harbor, Indiana (Fng. 16 (a), R. 3536–7). But conduit, wherever produced, was sold upon either the Pittsburgh or Chicago base depending upon which was controlling at the particular destination (Fng. 16 (b), R. 3537).

Beginning with Card No. 1, all price cards which the petitioners have issued have borne numbers identical with the corresponding cards of the other petitioners, and the cards of all petitioners of any given number have been identical in all material particulars. When, as sometimes happened, a petitioner did not issue a card of a given number but instead announced a percentage discount from a previous card, the next card which it issued bore a number coinciding with that borne by the corresponding cards of the other petitioners. (Fng. 4 (c), R. 3498.)

PREPARATION OF COMMON RATE FACTORS

Petitioners' use of the same base prices and delivery-charge factors permits the quotation of identical delivered prices provided each employs the same railroad tariff rate in selecting the applicable delivery-charge factor (Fng. 6 (a), R. 3503). Since it is often difficult to determine

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such tariff rate exactly, mistakes in selecting the rate to be used in particular instances were a source of differences in delivered-price quotations (*ibid.*). During the NRA-Code period Rigid Steel Conduit Association furnished for its members tariff rates involving unusual destinations or rates (Fng. 6 (b), R. 3504). Subsequently, the Association published freight rate bulletins for the use of its members[10] in ascertaining, in conjunction with the delivery-charge pamphlets, the delivered prices to be quoted at the destinations covered (Fng. 6 (c), R. 3504). Later the tariff expert who had prepared the bulletins for the Association suggested that "it would be to the best interests of the individual members to prepare a freight rate schedule that would be distributed in the name of or by the individual member", and thereafter the conduit sellers (including most of the petitioners) "individually" purchased and paid for the bulletins which he compiled (Fng. 6 (d), R. 3506–7).

The foregoing freight rate bulletins designated the rate to each destination from either Pittsburgh or Chicago, and thus indicated both the controlling base and the applicable rate (Fng. 6 (e), R. 3508). Since the bulletins showed rates only from Pittsburgh and Chicago, they could not be used for shipping purposes by a seller shipping from any other point, and even for those plants

[10] Substantially all of the petitioners were members of Rigid Steel Conduit Association (R. 3485–91).

at Pittsburgh or Chicago the bulletins were not adequate for shipping purposes (Fng. 6 (e), R. 3508–9).

THE PRICE IDENTITY RESULTING FROM PETITIONERS' PRICING PRACTICES

Petitioners have consistently published identical price quotations and have determined these quotations upon a basing-point, delivered price basis (Fng. 16 (e), R. 3537). They have refused to quote true f. o. b. mill prices except occasionally on bids to the federal government when a land-grant freight rate was available to it (*ibid.*). Their pricing methods have produced a substantial degree of delivered-price identity both in private sales and in public bids (Fngs. 15 (a), (b), R. 3531, 3534).

Rigid Steel Conduit Association tabulated the percentage of all sales of conduit which were "on card", that is, which accurately reflected the controlling base price plus the applicable delivery-charge factor. It reported that for the months of November and December 1937 and March 1938 the percentage of tonnage which was "on card" was, respectively, 80.86%, 81.46% and 87.05%. Departures from card prices were principally confined to particular and limited areas. (Fng. 15 (b), R. 3534–5.)

The degree of price identity achieved in the sale of conduit is illustrated by the results of sealed bids submitted to public agencies. In bids to The Panama Canal in June 1935 for supplying 111,000

feet of conduit f. o. b. Cristobal or Balboa, Canal Zone, 32 of the 33 bidders bid $8188.90, and one bid $8147.70.[11] Under a policy of disregarding bids which did not comply with the invitation, the award in this instance was made by lot. (Fng. 15 (a), R. 3531–2.)[12]

The economic principle that, in a truly competitive market, the unit price of a homogenous commodity tends to become approximately uniform does not serve to explain the results of the use of petitioners' pricing formula (Fng. 18 (c), R. 3542).

PRICE RIGIDITY

The price of conduit has shown a high degree of rigidity. Prices established by cards 72 and 82 were in effect at least 8 months, card 80 about

[11] The bidders included ten of the twelve corporate petitioners.

[12] Sealed bids were made to the Navy Department in October 1940 on a per-foot price basis for more than a million feet of conduit for delivery at various Naval establishments. Five of the petitioners here, Clayton Mark, Enameled Metals, Republic, Triangle, and Youngstown, were among the bidders. For delivery at the Brooklyn Navy Yard each of these petitioners submitted bids of $0.0499 for ½-inch conduit, $0.0639 for ¾-inch, $0.0920 for 1-inch, $0.1244 for 1¼-inch, $0.1490 for 1½-inch, and $0.2005 for 2-inch. For delivery at the Sewells Point, Virginia, depot each of them bid $0.0502 for ½-inch, $0.0643 for ¾-inch, $0.0925 for 1-inch, $0.1252 for 1¼-inch, $0.1499 for 1½-inch, and $0.2017 for 2-inch. For delivery at the Charleston, South Carolina, Navy Yard each of them bid $0.0512 for ½-inch, $0.0656 for ¾-inch, $0.0946 for 1-inch, $0.1279 for 1¼-inch, $0.1532 for 1½-inch, and $0.2062 for 2-inch. (Comm. Exs. 719, 720.)

10 months, card 69 about 12 months, and card 70 about 18 months (Fng. 16 (d), R. 3538). Not only have prices failed to respond to changing conditions of supply and demand, both locally and nationally, but they have also remained rigid for long periods in the face of rapidly decreasing demand (*ibid.*). The Chicago base price, which controls a relatively small area, has been consistently maintained at approximately $4 per ton above the Pittsburgh base (Fng. 16 (b), R. 3537).

The formula used by petitioners in pricing and selling conduit is recognized by economists as a controlled or monopolistic price system which does not in operation conform to recognized economic principles indicating the existence of free or effective competition (Fng. 18 (b), R. 3541–2).

DISCRIMINATION AMONG PURCHASERS

Adherence to the pricing formula requires sellers of conduit to discriminate among their customers. A seller whose plant is not located at a basing point charges fictitious delivery costs to purchasers in all the areas where he has a freight advantage as compared with the controlling base point. In one transaction a company with a plant near Philadelphia quoted a price in Philadelphia which included approximately $25,000 in phantom freight. On the other hand, when such a concern sells to purchasers

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located in the freight-advantage territory of a base mill, one element of his quoted price is a delivery-charge factor which has no relation to, and is less than, his actual freight costs; and his mill net or real price is therefore less than the base price used in computing his delivered price. (Fngs. 17 (a)–(b), R. 3539–40.)

PETITIONERS' CONSCIOUS USE AND KNOWLEDGE OF THE PRICING FORMULA

Each petitioner has necessarily known that the others quoted and sold conduit according to the same basing-point, delivered-price formula (Fng. 17 (e), R. 3541). Each has known that by the use of this formula he will be able to quote a price at any given destination identical with the prices quoted by every other user of the formula (Fng. 18 (a), R. 3541).

Petitioners have recognized that some conduit sellers, by reflecting the advantages of their locations in their prices, could exclude others from selling in certain markets; that the pricing formula used by them offered compensations in the form of higher profits to the favorably located seller on sales in his freight-advantage territory in return for his refraining from pressing his advantage of location; that in order to maintain a price level high enough to permit each petitioner to sell in the freight-advantage territory of other conduit sellers, price competition must be restrained; and that use of the formula enables

each petitioner to bring about a condition of matched prices (Fng. 5 (a), R. 3500).

Each participant in the use of the pricing formula which the petitioners employed consciously intends not to press the competitive edge he has in his freight-advantage territory in return for similar restraint upon the part of other sellers in their respective freight-advantage territories. Each such participant in effect invites others to share in the available business in his freight-advantage territory in return for reciprocal invitations. (Fng. 18 (a), R. 3541.)

EFFECTS OF PETITIONERS' PRICING FORMULA

The effect of the use by an individual petitioner of the pricing formula which they have employed, concurrently with use of the same formula by other of the petitioners, is to hinder, lessen and restrain price competition in the sale of conduit, to deprive purchasers of the benefits of price competition, to discriminate unfairly among purchasers, and to create in each petitioner a dangerous tendency toward monopolistic control over price (Fng. 19 (b), R. 3543).

SUMMARY OF ARGUMENT

I

Petitioners have at all times determined their prices by the use of a highly artificial formula involving specific common factors; and the systematic use of this formula, which has involved conscious parallelism of conduct by petitioners, necessarily

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produces identity in their delivered prices and eliminates price competition among them. Conduct of such kind is among the unfair methods of competition which the Federal Trade Commission is empowered to prohibit.

The Trade Commission Act is designed to stop in their incipiency practices which have a dangerous tendency to bring about the restraints and monopolies prohibited by the antitrust laws. Petitioners' conduct not only produces all the effects of price fixing but differs from a price-fixing agreement which is *per se* illegal under the Sherman Act only in the absence of formal combination among petitioners. Combination or agreement is not, however, a necessary or customary element of the unfair methods of competition which the statute prohibits. Moreover, it is settled that the Trade Commission Act is applicable to action by a single trader which, in conjunction or cooperation with action of others, hinders, restrains, or suppresses competition. Furthermore, since petitioners' method of pricing results in price discrimination within the meaning of Section 2 of the Clayton Act, their practices run counter to the policy of that Act and, for this reason, too, are within the unfair methods of competition prohibited by the Trade Commission Act.

II

The sole paragraph of the Commision's order which has been attacked by petitioners prohibits them from doing certain things "for the purpose

or with the effect of systematically matching delivered-price quotations" with other of petitioners. The specified prohibitions of the paragraph, as thus modified, prevent the persistent, continuing, and intended matching of prices, such as has been the practice of petitioners, but do not prohibit use of any method of pricing as such, whether or not it involves freight absorption. The prohibitions of the assailed paragraph run against only the pricing practices in which petitioners have engaged, and which the Commission determined to be unlawful, or against pricing practices similar in nature and producing like effects. Under the wide discretion in choice of remedy vested in the Commission, as in other like administrative bodies, the questioned prohibitions of the order clearly do not transcend relief which it was permissible for the Commission to grant.

ARGUMENT

I

THE USE BY PETITIONERS, TOGETHER WITH ALL OTHER MEMBERS OF THE INDUSTRY, OF A SPECIFIC, ARTIFICIAL PRICING FORMULA PRODUCING, AND DESIGNED TO PRODUCE, IDENTITY IN THE PRICE AT WHICH THEY SELL TO PURCHASERS IN ANY GIVEN LOCALITY, CONSTITUTES, IRRESPECTIVE OF FORMAL COMBINATION OR AGREEMENT AMONG THEM, AN UNFAIR METHOD OF COMPETITION WHICH THE FEDERAL TRADE COMMISSION IS EMPOWERED TO PROHIBIT

The two major issues before the Court are (1) whether the Commission had authority under the statute to determine that the pricing method used

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by the petitioners constitutes, irrespective of formal combination or agreement among them, an unfair method of competition and (2) whether, if so, any provisions of the Commission's order exceed the relief appropriate to put an end to such illegal conduct.

Petitioners have discussed the first question (Br. 29–44) without any reference to the facts found by the Commission other than a passing reference (Br. 29) to the general findings embodied in the last paragraph (19 (b), R. 3543) of its findings, and a passing reference (Br. 33) to certain findings assumed to be the basis for one portion of the general findings of the concluding paragraph.

We submit that the power of the Commission to rule that the use made by the petitioners of their pricing formula violated the Act, irrespective of combination or agreement among them, can be properly judged only after consideration has been given to the character of their formula and the actual use which was made of it. The legality of the basing-point price formula here employed cannot be determined in the abstract, entirely apart from its particular industrial context and from the use made of it by the particular sellers and its actual effect upon competition and commerce. The facts as to this are set forth in the findings of the Commission—findings which the petition for certiorari did not challenge.

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A. *The nature of petitioners' pricing formula, the use which they made of it, and its effects*

On the facts found by the Commission, it cannot be questioned that the petitioners have at all times determined their prices by the use of a highly artificial formula involving specific common factors; that its use has involved conscious parallelism of conduct; and that use of the formula, whether by concert of action or not, eliminates price competition among those who employ it. The facts found by the Commission which support this statement are summarized below:

Petitioners have sold only at delivered prices, with exceptions which in reality were no exceptions (Fng. 16 (c), R. 3537).

Each petitioner has sold, irrespective of the actual location of his mill, only at a Pittsburgh or a Chicago base price, and prior to 1924, when the steel companies made Chicago a basing point, the companies then in business all sold only on a Pittsburgh base (*supra,* pp. 10–11, 13).[13] Thus the producer at Struthers, Ohio, at Conshohocken, Pennsylvania, at Cohoes, New York and St. Louis, Missouri, determined what his selling price would be by taking as one factor the base price established by some other company or companies

[13] In connection with the long-continued sales on a Pittsburgh-plus basis, it is to be noted that Youngstown has been producing conduit at Struthers, Ohio, since 1912 (R. 1741), and that the capacity of the Struthers plant is the fourth largest in the industry (Resp. Ex. 30).

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located in a different area."[11] In the case of such producer, this method of pricing brings about the incongruous result that the nearer the purchaser is to the seller's mill, the higher the price which he receives from the purchaser and, at the same time, the greater the portion of that price actually accruing to the seller after he has paid, as the delivered-price system requires, the freight charge to destination.

The other factor in petitioners' pricing formula, the assumed delivery costs from Pittsburgh and Chicago, has been dealt with differently from time to time, but at any given time always in the same way by all petitioners. The first method was the system of discount from the base price, the discount diminishing approximately as the freight rate from basing point increased (*supra*, pp. 10–11). Subsequently all companies adopted the system of using "freight adders" to determine the delivered prices to be charged at particular destinations (*supra*, p. 12). Still later, all companies changed from the system of using arbitrary key numbers to determine delivered prices and used a booklet which stated the delivery-charge factor in terms

[11] The artificiality involved in adopting the base price of a producer at another, and perhaps distant, point of production is indicated by the statement in petitioners' brief in support of certiorari (p. 32, note) that the producer at Conshohocken has to "pay freight on its principal raw material, standard steel pipe (R. 527)—a cost not incurred by conduit manufacturers located in the vicinity of the steel pipe producers at Pittsburgh."

of half-cent steps in the railroad tariff rate from Pittsburgh and Chicago (*supra*, pp. 12–13). Since "mistakes" in selecting the applicable freight rate sometimes brought about variation among the petitioners in their delivered prices at particular places, such minor variation in price was guarded against by publication, for their common use, of freight rate bulletins giving the applicable rate, as well as the applicable base (*supra* p. 14).

Petitioners, in effect, publicized to the trade the identity in their delivered prices. Each of them, when issuing a price card, gave it a serial number which was the same as the serial number borne by the current cards of all other petitioners (*supra* p. 14).

When, as here, each member of an industry determines his delivered price at any and all destinations by adopting the same basing point, the same price at such point, and the same adjustment thereof with reference to the particular destination, all necessarily sell at an identical price to the purchasers at any given location. To the extent that the sellers adhere to this pricing formula, price competition is completely eliminated.[15] The effect is precisely the same as that produced by a price-fixing agreement.[16]

[15] The degree of adherence shown in sealed bids made to public agencies is quite startling (*supra*, pp. 16–17). Data collected through petitioners' trade association showed that the percentage of tonnage which was sold "on card" was, for the periods covered, between 80.8% and 87.1% (*supra*, p. 16).

[16] For an informed discussion of the economic effects of the basing-point system and other delivered-price systems

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Petitioners in their joint brief filed in the court below strenuously contended (pp. 45–58) that there was no substantial evidence of any combination or conspiracy among them with reference to prices or methods of determining price.[17] If petitioners' interpretation of the evidence were to be accepted, then, under the view as to the law which they urge upon this Court, each petitioner is free to employ their pricing formula (with its specific common factors), to continue to sell at uniform prices, and to immunize the industry from price competition.

The facts as to petitioner Spang Chalfant bring into focus the consequences of petitioners' view as to the limited scope of the Commission's authority. Spang Chalfant entered the conduit business when it purchased the manufacturing plant of Central Tube in February 1940, less than a year before issuance of the Commission's complaint (Fng. 1 (x), R. 3490). It did not become a member of petitioners' trade association, which

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and of their legality, see Comment, *Price Systems and Competition: The Basing-Point Issues*, 58 Yale Law Journal 426–456.

[17] In their brief below, they stated (pp. 50–51):

"Not one iota of evidence was adduced by the Commission * * * to cast doubt upon the unqualified denials made by responsible officials of the various manufacturers (who covered the industry) of any understandings, agreements or concerted action with respect to the adoption or continuance of that method of pricing or of any of its features, including basing points, price cards, freight bulletins and delivery charge booklets."

was dissolved in April 1940 (*id.*), and the Commission dismissed as to Spang Chalfant the charge based on combination and agreement set forth in Count I of its complaint (R. 3548).

Spang Chalfant, upon entering the business, adopted the pricing practices used by the other petitioners.[18] It consistently published price quotations identical with those of the other petitioners, computed upon the same basing-point, delivered-price basis (Fng. 16 (c), R. 3537); purchased and used rate bulletins prepared for the common use of petitioners (Fng. 6 (f), R. 3509); adopted the uniform form of specific-job contract which had been prepared under the aegis of petitioners' trade association (Fng. 9 (c), R. 3517); and adopted the practice of other petitioners in utilizing a consignment contract providing for price maintenance (Fng. 8 (d), R. 3515).

Petitioners contend (Br. 30–31) that uniformity in their delivered prices is not "produced" by the use of their pricing formula but is attributable to the "fact" that "all sellers in a given market normally quote the same delivered price."[19] The obvious answer is that, whatever may be the determinants of price in a free market, in this industry

[18] H. G. Morrow, who had been a vice president of Central Tube and who had taken an active part in the affairs of petitioners' successive trade associations, became an official of Spang Chalfant (Fngs. 1 (a), (h); R. 3482, 3484).

[19] For this statement of economic principle, counsel cite no authority.

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the sole determinant was the formula by which petitioners specified delivered prices uniform for all of them. Plainly it was the formula and its use which produced price uniformity.[20]

Dr. Edwin G. Nourse, the present Chairman of the President's Council of Economic Advisers, who was then director of economics of the Brookings Institution, testified (R. 1066):

> Now, if you find quotations of producers who presumably do have differences in their production situation and in their cost and they all are making the same quotation, it would seem to indicate either a miraculous agreement on what is good policy amongst them, or else some means of working out a uniform plan of quoting the same price as being desirable for the trade as a whole, for the group, whatever it may be.

Petitioners also seem to contend (Br. 31) that all of their delivered-price quotations constituted "the meeting of a competitive price," that meeting a competitive price "*is* competition," and that it is a "contradiction in terms" to state that use of their pricing formula "adversely affects competition." But when the formula fixes the delivered

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[20] In *Federal Trade Commission* v. *Cement Institute, Inc.*, 333 U. S. 683, 699, the Court said that under a basing-point system of pricing, whether one or more basing points are used, "all sellers quote identical delivered prices in any given locality regardless of their different costs of production and their different freight expenses," and that both the multiple and single systems "*produce* the same consequences—*identity of prices* and diversity of net returns." [Italics supplied.]

price and this price, in any particular market, is uniform for all, we submit that there is no "competitive price." Which petitioner quotes the "competitive price" which the others then "meet," i.e., match? In sales to a purchaser in Philadelphia, is it the Pittsburgh producer who must deduct the Pittsburgh-Philadelphia freight charge from the price which he receives, or is it the producer nearby Philadelphia who quotes as his price the base price of the *Pittsburgh* producer plus the latter's Pittsburgh-Philadelphia freight charge?

In *Federal Trade Commission* v. *Cement Institute, Inc.*, 333 U. S. 683, 720–721, this Court said, with reference to a pricing system substantially the same as that involved here, that it "provides an effective instrument which, if left free for use of the respondents, would result in complete destruction of competition and the establishment of monopoly in the cement industry."

B. *Petitioners' pricing practices are, irrespective of combination or agreement, within the unfair methods of competition which the Federal Trade Commission is empowered to suppress*

Conscious parallelism of conduct such as we have previously shown may, of course, evidence or constitute combination and agreement. *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 226–227; *United States* v. *Masonite Corp.*, 316 U.

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S. 265, 275. Certainly the distinction between such conduct and a price-fixing agreement is, at best, a fine one.

Price fixing is *per se* a violation of the Sherman Act, and prices are fixed within the meaning of that Act when they involve "establishment of uniform prices" or the basis of their computation is "agreed upon." *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 222. A price-fixing agreement is likewise within the unfair methods of competition prohibited by the Trade Commission Act. *Cement Institute* case, *supra*, at pp. 689–693. The question which this case poses is whether the prohibitions of that Act equally embrace conduct which not only differs from price fixing only by a hair's breadth, but also produces all the effects of price fixing. We submit that the prohibitions of the Trade Commission Act as expressed in its language and the holdings as to its scope and application are not so confined as to exclude conduct of this kind.

The words of the statute, "unfair methods of competition," do not remotely suggest that they are limited to conduct which is the product of combination or conspiracy. There have been countless proceedings under the Act, upheld by the courts, against false or misleading representations in the sale of goods where combination or agreement was neither charged nor proved. If the statute's meaning were otherwise doubtful, these

decisions would conclusively establish that concert and agreement is not a necessary or usual element of the practices against which the statute is directed. Petitioners, as we understand their brief (see pp. 41–42), do not contend otherwise.

Congress, it has been held, did not intend to confine the prohibitions of the Act to "fixed and unyielding categories," but adopted a broad and flexible phrase which gives to the Commission, subject to court review, wide latitude in determining what conduct is proscribed. *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304, 310–312, 314. The legislative history of the Act reveals an "abiding purpose" to vest the Commission and the courts with adequate powers to reach "every trade practice, then existing or thereafter contrived, which restrained competition or might lead to such restraint if not stopped in its incipient stages." *Cement Institute* case, *supra*, p. 693.

In the earliest as well as the most recent cases under the Act this Court has unequivocally declared that the statute applies to practices which have a dangerous tendency to restrain or destroy competition and that it is designed to stop in their incipiency practices tending to bring about the restraints and monopolies prohibited by the antitrust laws.[21]

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[21] *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 427; *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257

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The authority of the Commission to determine, in the absence of a charge or finding of combination, that the present petitioners have violated the Act necessarily follows, we submit, from the following: (1) The Act gives authority to bring to a halt practices which produce or are likely to produce restraint and monopolies against which the antitrust laws are directed. (2) Petitioners' practices not only threaten to, but do, suppress price competition, one of the foremost evils which the antitrust laws are designed to prevent. (3) The one respect in which petitioners' conduct may be distinguishable from actual violation of the antitrust laws, absence of combination or agreement among them, is not a necessary element of the unlawful conduct which the Trade Commission Act condemns.

The Federal Trade Commission Act has been held applicable to action by a single trader which, in conjunction or cooperation with action of others, hinders, restrains, or suppresses competition.

Federal Trade Commission v. *Beech-Nut Packing Co.*, 257 U. S. 441, involved a system of merchandising under which Beech-Nut enlisted

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U. S. 441, 453–454; *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 647; *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304, 310; *Fashion Originators' Guild, Inc.* v. *Federal Trade Commission*, 312 U. S. 457, 465; *Federal Trade Commission* v. *Cement Institute, Inc.*, 333 U. S. 683, 690–691.

the cooperation of wholesalers and retailers to maintain the resale prices specified by Beech-Nut and to prevent wholesalers or retailers who did not maintain such resale prices from obtaining its goods. On review of an order against Beech-Nut issued by the Commission in a proceeding under Section 5 of the Trade Commission Act, this Court said (p. 454) that if the company's merchandising system "is against public policy because of its 'dangerous tendency unduly to hinder competition or create monopoly,' it was within the power of the Commission to make an order forbidding its continuation." The Court held (p. 455) that the finding by the Commission that Beech-Nut's merchandising conduct "does not constitute a contract or contracts whereby resale prices are fixed, maintained, or enforced" did not deprive the Commission of power to act. The Court said (*id.*):

> The specific facts found show suppression of the freedom of competition by methods in which the company secures the cooperation of its distributors and customers, *which are quite as effectual as agreements expressed or implied intended to accomplish the same purpose.* [Italics supplied.]

In *Federal Trade Commission* v. *Pacific States Paper Trade Association,* 273 U. S. 52, each of several associations of jobbers of paper had agreed upon the prices to be charged by its members in sales within the state of the particular

association. It was stipulated, and also found by the Commission, that the salesmen of members habitually carried and used the association list prices in making sales to out-of-state purchasers, but that there was no express or implied agreement to adhere to the list prices in such sales.[22] Paragraph (b) of the Commission's order prohibited the local associations and their members, "separately or in combination," from using in interstate sales any price list which had been agreed upon with respect to local sales.[23] This Court held Paragraph (b) valid, stating (p. 63) that the Commission was justified in concluding that "habitual use of the established list lessens competition and fixes prices."

In the *Cement Institute* case, *supra,* the Court clearly indicated that the Commission was authorized to conclude, irrespective of any finding of combination, that the cement producers' pricing system (corresponding closely to that of the present petitioners) constituted an unfair method of competition. The Court said that "individual conduct, or concerted conduct, which falls short of being a Sherman Act violation may as a matter of law" be within the prohibitions of the Trade Commission Act (p. 708); that the Commission is empowered to find

[22] See 273 U. S. 52, at pp. 60–61; Record in this Court in No. 71, October Term 1926, p. 202.

[23] See 273 U. S. 52, at p. 61; Record in this Court in No. 71, October Term 1926, p. 212.

violation of the Act if a pricing system, as practiced, "either restrains free competition or is an incipient menace to it" (p. 709); and that in such a case existence of "combination" is not "an indispensable ingredient of an 'unfair method of competition' under the Trade Commission Act" (n. 19, p. 721).

In *Eugene Dietzgen Co.* v. *Federal Trade Commission,* 142 F. 2d 321, 331 (C. A. 7), certiorari denied, 323 U. S. 730, where various members of an industry were found to have been parties to a price-fixing combination, the court held the Commission's order valid as to two companies which had not joined the original price-fixing combination, but had later adopted the schedule of prices fixed by their competitors. The Court said (p. 331):

> We must look to the substance and not to the form of the conspirators' conduct. We do not think that affirmative, positive, express agreement to maintain prices is essential to establish unfair trade practices. If the parties clearly and intentionally maintain the prices, even though without express agreement, they are liable. In such a situation their action may fall within the prohibition of the Federal Trade Commission Act, 15 U. S. C. A. § 41 et seq.

In *Armand Co., Inc.,* v. *Federal Trade Commission,* 84 F. 2d 973 (C. A. 2), certiorari denied, 299 U. S. 597, the Court sustained an order entered in a proceeding charging a conspiracy

to maintain resale price, in which the Commission had dismissed the complaint as to all but one company. The Court said (p. 974):

> None the less, the company made agreements with them which were exactly those alleged as the content of the conspiracy; the parties and the performance were precisely the same. The Commission might enjoin the company from so conducting itself, whether under the name of conspiracy or of an individual "unfair method of competition."

Petitioners seem to contend (Br. 34–44) that sale at delivered prices under the basing-point method is not, as such, a violation of Section 2 of the Clayton Act, that Congress intended that this method of selling should be governed solely by the prohibitions of Section 2, and that it is therefore not within the purview of the Trade Commission Act.

We fail to see any force in these contentions, in the light of the established rule that sales at delivered prices under a basing-point method may constitute price discriminations forbidden by Section 2 of the Clayton Act and they may also constitute unfair methods of competition coming within the ban of the Trade Commission Act.[24] The pertinency to the present case of Section 2

[24] *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726; *Federal Trade Commission* v. *Staley Co.*, 324 U. S. 746; *Federal Trade Commission* v. *Cement Institute, Inc.*, 333 U. S. 683, 721–726.

of the Clayton Act consists in the fact that petitioners' method of pricing results in price discriminations within the meaning of Section 2 of the Clayton Act and actually violates that section unless saved therefrom by its limitations and provisos.[25] Since their pricing practices therefore run counter to the policy of Section 2, this is an added reason for holding that they come within the prohibitions of Section 5 of the Trade Commission Act. If a practice "runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has power to suppress it as an unfair method of competition." *Fashion Originators' Guild, Inc.* v. *Federal Trade Commission,* 312 U. S. 457, 463.

II

THE PROHIBITIONS OF PARAGRAPH V OF THE COMMISSION'S ORDER DO NOT EXCEED THE RELIEF WHICH THE COMMISSION WAS AUTHORIZED TO GRANT TO PREVENT FURTHER VIOLATION OF THE STATUTE BY PETITIONERS

If, as we have contended under Point I, the Commission properly determined that petitioners' conduct, apart from combination among them, violated the Trade Commission Act, it becomes necessary to determine whether the prohibitions of Paragraph V of the Commission's order will be permissible relief. In this connection, the first thing to be determined is the meaning of Paragraph V.

[25] Cases cited in preceding note.

A. *The meaning of Paragraph V*

> Paragraph V (R. 3547) prohibits petitioners—
>
> from doing any of the following things for the purpose or with the effect of *systematically matching* delivered-price quotations with other of said respondents or producing the equivalent of such matched delivered prices through *systematic* discriminations in the mill nets received on sales to different purchasers. [Italics supplied.]

This language qualifies and conditions each of the following subparagraphs lettered (a)–(d). In effect, it is incorporated in each subparagraph.

Petitioners' discussion (Br. 20–28) of the scope and effect of the various subparagraphs is, we submit, inaccurate and misleading because it ignores the effect of the above qualifying language. The reasons given by petitioners (Br. 17–20) for disregarding this material portion of the order are, we believe, untenable and fallacious.

Petitioners' first reason is that "the purpose and effect therein described are lawful." Even if this statement were correct, the language of the order would nevertheless have to be given consideration in determining its meaning. For example, Paragraph V is confined to acts done in connection with selling, offering for sale, and distributing "rigid steel conduit" in interstate commerce. Since it is lawful to sell rigid steel

conduit it would follow, under petitioners' reasoning, that the order should be interpreted as if not limited to rigid steel conduit, i. e., as if applicable to commodities of every kind.

Petitioners' second reason (Br. 17–20) for ignoring the qualifying language is that, in substance, it sets forth the conditions under which all business is carried on, that it is therefore as broad as business itself and thus does not as a "practical matter" limit the prohibitions of the order. Petitioners' contention comes to this—that in this country business is carried on for the "purpose" and with the "effect" of "systematically matching" competitors' prices. We submit that a philosophy and result so alien to the rules established by Congress for the regulation of interstate trade and embodied in the antitrust laws requires for its acceptance something more than counsels' unsupported statement.

To ascertain the meaning of Paragraph V we must look to the meaning of the key words of the introductory clauses which govern its prohibitions. The key words are "systematic" and "matching."

Webster's New International Dictionary, Second Edition, defines "systematic":

> Carried on, or carrying out a design, with thoroughness, regularity or, sometimes, inveteracy; as systematic efforts, attacks, intrigues or intriguers.

In *Federal Trade Commission* v. *Staley Co.*, 324 U. S. 746, 753, the Court said that a sharp distinction was to be drawn, with reference to Section 2 of the Clayton Act, between "individual competitive situations" and a general "system" of competition. The same distinction was emphasized in the *Cement Institute* case, *supra*, at p. 725.

In interpreting the meaning of the word "systematic" as used in a statute, it has been said: "In common parlance, to do a thing systematically is to do it by a certain method previously adopted as tending to accomplish the desired result." *State* v. *Kistler*, 119 Nebr. 89, 92. And with reference to the meaning of the word "system" as used in a statute, it has been said that the word "itself imports a unity of purpose as well as an entirety of operation." *Board of Education* v. *State*, 26 Okla. 366, 371.

Webster's New International Dictionary, 2nd Edition, defines the verb "match":

> To make or procure the equal of, or that which is exactly similar to, or corresponds with; to seek or put together in pairs or sets of equal, corresponding, or suitable parts or members; as to match a vase, horses.

In the light of the meaning of the key words of the qualifying introductory clauses of Paragraph V, it is clear that this paragraph does not prohibit use of any method of pricing as such, whether or not it involves freight absorption. The

order does prevent the persistent, continuing, and intended matching of prices, such as has been the practice of petitioners. But if individual sellers quote delivered prices at individual destinations on the basis of competitively endeavoring to market the greatest possible volume of goods consistent with obtaining a price yielding a profit, and not in accordance with a system which itself establishes and predicates the price at destination point and thus necessarily results in price uniformity, the fact that in a given locality all sellers may quote and sell at a delivered price which is the same as the lowest price which is there currently quoted by a substantial competitor would not, standing alone, be "systematically matching" the price of others within the meaning of Paragraph V. In other words, the mere showing of such fact would not establish violation of Paragraph V.

B. The prohibitions of Paragraph V constitute appropriate relief and are not an unreasonable exercise of the discretion respecting the remedy vested in the Commission

This Court has recently set forth the principles governing the validity of the Commission's determination of relief in proceedings under the Trade Commission Act. In *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U. S. 608, 611–612, the Court said:

> The Commission has wide discretion in

> its choice of a remedy deemed adequate to cope with the unlawful practices in this area of trade and commerce. Here, as in the case of orders of other administrative agencies under comparable statutes, judicial review is limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy.

We now consider, in the light of these principles, the three subparagraphs of Paragraph V which petitioners attack.[26]

Subparagraph (a) reads:

> Quoting or selling rigid steel conduit at prices calculated or determined pursuant to, or in accordance with, the basing-point, delivered-price system.

The prohibitions of this subparagraph, as limited by the introductory clauses previously discussed, run directly against the pricing practices which the petitioners have long used. If, as we are now assuming, the Commission validly determined that, apart from combination, petitioners' conduct violated the Trade Commission Act, the

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[26] Although petitioners' brief (20–21) refers to subparagraph (b), it is not included in their specification of errors (Br. 12–13) or the "questions presented" by the petition for certiorari (Pet. 9–10). In any event, since this subparagraph deals with a method of pricing necessarily involving price discrimination condemned by Section 2 of the Clayton Act, there can be no substantial question as to the validity of subparagraph (b). See *Fashion Originators' Guild, Inc.* v. *Federal Trade Commission*, 312 U. S. 457, 463–464.

prohibition against continuation of their prior illegal conduct is obviously warranted and free from any infirmity.

Subparagraph (c) reads:

> Quoting or selling rigid steel conduit at delivered prices which systematically reflect the inclusion of a transportation factor greater or less than the actual cost of transportation from point of shipment to destination.

Not only is this prohibition limited to instances in which there is a systematic matching of prices of competitors by means of the described method of pricing, but the subparagraph itself is confined to systematic treatment of the transportation factor in determination of delivered prices. The Commission was, of course, entitled to frame its prohibitions in the light of all the evidence in the case and in the light of its knowledge of systems or methods for quoting delivered prices (other than the basing-point system) used in other industries.[27]

As to evidence in this case which the Commission may have deemed pertinent when it framed the above prohibition, we call attention to certain testimony given by the president of Walker

[27] "The Commission is entitled not only to appraise the facts of the particular case and the dangers of the marketing methods employed (*Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483, 494) but to draw from its generalized experience." *Jacob Siegel Co.* case, *supra*, at p. 614.

Brothers.[28] When he was asked if he knew of any method other than the basing-point, delivered-price system which would afford a similar degree of uniformity in price, he answered (R. 3500):

> Oh, I am not willing to admit that the Pittsburgh basic method of selling is the only way by which uniform prices can be put together. It is one.

When asked to name other ways by which the same degree of identity and uniformity could be achieved, he answered (*id.*):

> I imagine that there are a great many other ways of figuring uniform prices outside of the Pittsburgh basic method of selling, but I can't answer your question without distorting the picture. This is one method by which it is done. There must be others.

What this Court said in *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 436–437, is directly pertinent:

> The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts

[28] Walker Brothers was one of the respondent's named in Count II of the complaint (R. 19), it was one of the respondents against which Paragraph V of the Commission's order was issued (R. 3547), and it was one of the petitioners in the court below (R. 3579).

> which the Board has found to have been committed by the employer in the past.

In *Hershey Chocolate Corp.* v. *Federal Trade* Commission, 121 F. 2d 968, 971–72 (C. A. 2), the Court said:

> Likewise the Commission's power would be limited indeed if it were restricted to enjoining unfair acts of competitors only as evidenced in the past. To be of any value the order must proscribe the method of unfair competition as well as the specific acts by which it has been manifested. In no other way could the Commission fulfill its remedial function.

We submit, therefore, that the Commission was justified in providing that the prohibitions of its order should run against pricing methods similar to those used by the petitioners and having a like effect and purpose.

The considerations referred to in connection with subparagraph (c) equally support subparagraph (d), which reads:

> Discriminating among purchasers by quoting or selling rigid steel conduit at prices which systematically differ in terms of mill nets according to the location of purchasers, and which mill nets, plus common carrier transportation charges to the respective locations of such purchasers, produce delivered costs identical with those to such purchasers from differently located respondents.

III

IF THE DETERMINATION AS TO PETITIONERS' VIOLATION OF THE ACT CANNOT STAND APART FROM A FINDING OF FORMAL COMBINATION, THE COMMISSION SHOULD BE GIVEN AN OPPORTUNITY TO DECIDE WHETHER THE PROVISIONS OF PARAGRAPH V OF ITS ORDER CONSTITUTE RELIEF APPROPRIATE AND NECESSARY TO PREVENT CONTINUATION OF PETITIONERS' PRICE FIXING CONSPIRACY

We agree with petitioners' view (Br. 44–53) that the Commission incorporated Paragraph V in its order by way of relief against violation of the statute as charged in Count II of its complaint. It was therefore unnecessary for the Commission to consider whether the provisions of Paragraph V (or some modification thereof) constituted relief appropriate and necessary in order to prevent continuation of petitioners' unlawful price fixing conspiracy.

If this court should hold that, in the absence of formal combination, petitioners' conduct did not violate the Act, the basis upon which the Commission acted when it included Paragraph V in its order falls. In a like situation, where the Commission had failed to give consideration to a factor relevant to the relief which it granted, this Court, in reversing a judgment affirming the Commission's order, held that the Commission should be given a fresh opportunity to pass upon the question of requisite relief. *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 613–614.

We submit that likewise in the present case, if the basis upon which Paragraph V of the order now stands should be held to be erroneous, the court below should be directed to remand the case to the Commission to enable it to pass upon the question whether Paragraph V or any part of it is relief necessary and appropriate in order to dissipate the effects of petitioners' price-fixing conspiracy and to prevent continuation of this conspiracy.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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